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NO. 82-528

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE TRAVELERS INSURANCE COMPANY
Petitioners

VERSUS

TODD SHIPYARDS CORPORATION, AND
THE VESSEL S/S KATRIN

ON APPLICATION FOR PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WERE ATTORNEY'S FEES PROPER UNDER THE FACTS OF THIS CASE?

2. DOES THE AWARD OF INDEMNITY CONFLICT WITH DECISIONS OF THIS COURT AND DOES IT TRULY DENY EQUAL PROTECTION OF THE LAW TO TURBINE/TRAVELERS?

3. DOES THE AWARD OF PREJUDGMENT INTEREST WARRANT REVIEW BY THIS COURT?

STATEMENT OF INTERESTED PARTIES

The parties having an interest in the outcome of this case, pursuant to Rule 21.1(b) of the Rules of the Supreme Court, are listed as follows:

1. Auto Transportation, S.A.

2. Todd Shipyards Corporation

3. Travelers Insurance Company

4. Sentry Insurance, A Mutual Company

5. Turbine Services, Inc.

6. Gonzales Manufacturing and Industrial Machine Works, Inc.

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Respondent, Auto Transportation S.A., respectfully requests that this Honorable Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit in this case. That opinion is reported at 674 F.2d 401 (5th Cir. 1982), *reh'g denied* 680 F.2d 1389 (5th Cir. 1982). The opinion of the United States District Court for the Eastern District of Louisiana is reported at 467 F. Supp. 1257 (E.D. La. 1978).

JURISDICTION

This Court's jurisdiction is founded on 28 U.S.C. §1254(1). Petitioner herein suggests that inasmuch as the amount of attorney fees was not determined by the District Court that the Court of Appeals may not have had jurisdiction *vel non* based upon its recent decision in *Holmes v. J. Ray McDermott & Co., Inc.*, 682 F.2d 1143 (5th Cir. 1982). Such a suggestion ignores this Court's decision in *White v. New Hampshire Dept. of Employment Security*, __ U.S. __, 71 L.Ed.2d 325 (1982). Attorney's fees in this action are a collateral matter and, as such, are separable from the cause of action proved at trial. In *Holmes* the award of attorney's fees was "bound hand in hand" with the merits of that case.

Additionally, petitioner has not moved in any Court for the type of relief it suggests may be warranted by virtue of *Holmes*.

STATEMENT OF THE CASE

As noted by the Fifth Circuit Court of Appeals, "The trial of this blockbuster maritime action began on November 14, 1977 and ended May 23, 1978. There were 67 days of trial, 28 witnesses, over 7,000 pages of depositions and more than 600 exhibits offered. The record on appeal is contained in 83 volumes."[1]

[1] 674 F.2d 401, 405 n.1 (5th Cir. 1982).

The statement of facts by the Court of Appeals was correct and is adopted by respondent, Auto Transportation, S.A.

REASONS WHY THIS WRIT SHOULD BE DENIED

It should be noted at the outset that a companion petition for writ of certiorari has been filed in this Court by another insurer of a repairer under number 82-447. Neither petition presents any reason to justify the granting of writs by this Court.

Any analysis of the opinions in this case necessarily begin and end, at some point, with a discussion of the involved facts of this matter. The Court of Appeals used the term "clearly erroneous" in the negative a total of 14 times in its opinion. The facts as found are correct and there is more than ample legal authority to strike each alleged error and for this Court to deny certiorari.

QUESTION 1—WERE ATTORNEY'S FEES PROPER UNDER THE FACTS OF THIS CASE?

Petitioner's question presented for review intimates that the attorney's fees awarded in this case was "automatic." The particular facts of this case warrant the award of attorney's fees.

The award of attorney fees in this maritime action is not prohibited by *Alyeska Pipeline Co. v. Wilderness*

Society, 421 U.S. 240 (1975) which itself notes that the exceptions to the so-called "American Rule" included admiralty and maritime cases. In *Vaughan v. Atkinson*, 369 U.S. 527 (1962) this Court upheld the equitable power of a lower court in admiralty and maritime cases to award attorney fees.

This Court's decision in *Norfolk & Western R. Co. v. Liepilt*, 444 U.S. 490 (1980), specifically disallowed attorney fees based upon the language of the Jones Act.

Furthermore, both the District Court and the Court of Appeals noted the circumstances under which Auto Transportation, S.A., was forced to intervene in the litigation when Gonzales and Turbine Services liened the vessel's damaged turbine parts in their claim for monies owed them by Todd after Todd brought suit against them for return of the vessel's damaged turbine parts. 674 F.2d 401, 407. After such intervention, Todd, Gonzales and Turbine Services "united" in defending against Auto's claim for damage, presenting extensive multiple objections to practically every exhibit and much of the testimony offered by Auto. The Court of Appeals in rejecting Todd's claim that it should be entitled to attorney's fees held:

> "Here, Todd's indemnity award was, for the most part, based upon evidence not produced by Todd but by Owner's attorneys' perseverance. Moreover Todd not only defended against liability, but teamed up with Turbine Service and Gonzales to attack almost every item of damage sought to be proven by Owners." 674 F.2d 401, 417.

QUESTION 2—DOES THE AWARD OF INDEMNITY CONFLICT WITH DECISIONS OF THIS COURT AND DOES IT TRULY DENY EQUAL PROTECTION OF THE LAW TO TURBINE/TRAVELERS?

The fallacy of the first part of Travelers argument is that the express indemnity contract which it contends makes use of an implied warranty inapplicable is "obviously intended only to require insurance to indemnify Todd for damage caused to its property or employees during a bailment of Todd's property." 674 F.2d at 416. The damage herein occurred after Turbine Services had finished its work on the turbine blades.

The denial of equal protection argument is also lacking a proper factual foundation. The contract between Turbine and Todd did not cover the facts of the damage herein. Therefore the implied warranty gave Todd a right to indemnity. Turbine Services granted Gonzales an express release that covered the damages herein. Therefore Turbine was denied indemnity from Gonzales. 674 F.2d at 416-17.

Finally, indemnity in maritime cases is intended to place "the burden ultimately on the company whose default caused the injury". *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 314, 324 (1964). This was accomplished.

QUESTION 3—DOES THE AWARD OF PRE-JUDGMENT INTEREST WARRANT REVIEW BY THIS COURT?

The Court of Appeals stated in this regard:

> "To complete our consideration of the damage issues we take up the Owners contention that the district court erred in failing to award them pre-judgment interest because there are no peculiar circumstances justifying denial of such interest. While the court awarded post-judgment interest it made no mention of pre-judgment interest in either its judgment or its findings of fact and conclusions of law." 674 F.2d at 415.

There is no conflict with other circuits, contrary to the claim of petitioner.

In *Grace Line, Inc. v. Todd Shipyards Corporation*, 500 F.2d 361 (9th Cir. 1974), the denial of prejudgment interest was premised upon an interpretation of a stipulation of the parties. 500 F.2d at 366.

In *Circle Line Sightseeing Yachts Inc. v. Storbeck*, 325 F.2d 338 (2d Cir. 1963), the issue of prejudgment interest in a wrongful death claim brought in admiralty but based on state law was held to be governed by state law. 325 F.2d at 341.

Finally petitioner cited *Afran Transportation Co. v. The Bergechief*, 285 F.2d 119 (2d Cir. 1960), where the dis-

trict court made an express denial of prejudgment interest.

The Fifth Circuit rule requires a statement of the peculiar circumstances that justify denial of prejudgment interest; otherwise, an award of such interest is obligatory. Such is the rule of the Ninth Circuit:

> "In admiralty, prejudgment interest must be granted unless peculiar circumstances justify its denial." *Grace Line, Inc. v. Todd Shipyards Corp.*, 500 F.2d 361, 366 (9th Cir. 1974).

CONCLUSION

This case was extensively litigated for 6 months in the District Court, was again litigated before the Fifth Circuit Court of Appeals on original hearing and again on applications for rehearing and rehearing *en banc*, and now petitioner requests this Court to relitigate the facts of this case. There is no legal error to be shown by petitioners, only reaction to unpleasant facts. It is therefore submitted that the petition for certiorari be denied.

Respectfully submitted:

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